

U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7500
(202) 693-7365 (FAX)



Issue date: 28Jan2002

In the Matter of

DAVID C. BRANDON
Claimant

v.

MARINETTE MARINE
Employer
and
CNA/RSKCO
Insurer
and
CIGNA/FRANK GATES ACCLAIM
Insurer
and
DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS
Party in Interest

Case No.: 2000-LHC-1339
OWCP No.: 10-37731

Case No.: 2000 LHC 1656
OWCP No.: 10-38342

APPEARANCES:

Mr. H. Thomas Lenz , Attorney
For the Claimant

Mr. Theodore James Powers, Attorney
For the Employer, as insured by CNA/RSKCO

Mr. Gregory P. Sujack, Attorney
For the insurer CIGNA/Frank Gates Acclaim

Ms. Karen L. Mansfield, Attorney
For the Director (post-hearing)

BEFORE:

Richard T. Stansell-Gamm
Administrative Law Judge

DECISION AND ORDER

This case involves claims filed by Mr. David C. Brandon for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 - 950, as amended ("the Act"). The two claims

relate to two different work-related incidents involving his back alleged to have occurred on February 12, 1999 (2000 LHC 1339) and February 14, 2000 (2000 LHC 1656), respectively. I conducted a consolidated hearing with all parties present in Green Bay, Wisconsin on October 25, 2000, pursuant to an amended Notice of Hearing, dated September 6, 2000 (ALJ II).¹ My decision in this case is based on the hearing testimony and all the documents admitted into evidence: CX 1 to CX 6, and EX 1 to EX 5.²

Procedural History

On February 25, 2000, Mr. Lenz filed an LS-18, Pre-Hearing Statement, on behalf of Mr. Brandon that requested continued medical care for his injury and payment of temporary total disability associated with a February 12, 1999 work-related accident. Mr. Lenz also observed that Mr. Brandon had suffered another back aggravation at work and believed this event would lead to a second claim. Consequently, he requested that the claims be consolidated for a hearing with the Office of Administrative Law Judges (“OALJ”). The claim (OWCP No. 10-37731) was received by OALJ on March 2, 2000 and designated 2000 LHC 1339.

On March 17, 2000, Mr. Lenz submitted a second LS-18, Pre-Hearing Statement, that sought temporary total disability compensation and medical care for another work-related back problem Mr. Brandon experienced on February 14, 2000. The claim (OWCP No. 10-38342) was received by OALJ on March 27, 2000 and assigned case number 2000 LHC 1656. As requested by Mr. Lenz, the two cases, 2000 LHC 1339 and 2000 LHC 1656, were consolidated for the hearing before me.

ISSUES³

1. Whether Mr. Brandon’s back incident at home on December 12, 1999 was related to his February 12, 1999 work-related back injury or an independent and intervening event attributable to his own intentional conduct.
2. Whether Mr. Brandon’s back incident at work on February 14, 2000 was a natural progression of his February 12, 1999 work-related back injury, or an aggravation, acceleration or exacerbation of that back injury, to the extent it’s a new injury.

¹CX - Claimant exhibit; EX - Employer exhibit (CIGNA); DX - Director exhibit; TR - Transcript; and, ALJ - Administrative Law Judge exhibit. Mr. Powers, on behalf of RSKCO, did not submit any documents into evidence.

²At the close of the hearing, I kept the record open for receipt of a post-hearing deposition of Dr. Baek. On November 21, 2000 I received the deposition from Mr. Sujack (ALJ VI). Absent any objection, I now admit the deposition as EX 5.

³Mr. Sujack and Ms. Mansfield, counsel for the Director, have agreed that adjudication of any Section 8 (f) relief is premature since Mr. Brandon’s claims relate only to temporary disability.

3. Medical Treatment and Temporary Total Disability Compensation.

Parties' Positions

Claimant

On February 12, 1999, Mr. Brandon suffered a back injury at work. While following his course of treatment, Mr. Brandon returned to work with restrictions. On December 12, 1999, while getting out of a chair at home, Mr. Brandon experienced disabling back pain. Eventually, Mr. Brandon again returned to work with some limitations. Then, following another back problem at work on February 14, 2000, Mr. Brandon developed further symptoms that now warrant surgery. Neither insurer will accept responsibility for the cost of that appropriate procedure. Additionally, Mr. Brandon is entitled to temporary total disability compensation for the period December 13, 1999 through December 20, 1999 (TR, pages 8 to 11, 22 and 23, and closing brief).

Employer, as insured by CNA/RSKCO ("RSKCO")⁴

Mr. Brandon suffered a work-related back injury on February 12, 1999. However, in an intervening event, he suffered another back injury on December 12, 1999 in an incident at home. Then, after eventually returning to work for about another month and a half, on February 14, 2000, he suffered a new intervening accident at work which has lead to the development of new and significant symptoms that physicians believe may require surgery and cause more severe work limitations. In light of the subsequent intervening back incidents, RSKCO bears no responsibility for the cost of back surgery (TR, pages 11 to 13, and 16)

Employer, as insured by CIGNA/Frank Gates Acclaim ("CIGNA")⁵

Prior to February 14, 2000, Mr. Brandon had a bad back. According to the medical experts, his present condition is simply an extension of that pre-existing injury. Mr. Brandon did not suffer a new injury on February 14, 2000. Consequently, CIGNA is not responsible for the cost of surgery (TR, pages 13 to 17 and closing brief).

SUMMARY OF EVIDENCE

While I have read and considered all the evidence presented, I will only summarize below the information potentially relevant in addressing the issues in this case.

⁴RSKCO's insurance coverage of Marinette Marine terminated February 28, 1999 (TR, page 14)

⁵CIGNA became Marinette Marine's insurer as of March 1, 1999 (TR, page 14).

Sworn Testimony Presented by the Claimant

Mr. David Brandon
(TR, pages 31 to 92)

[Direct Examination] Mr. Brandon is 29 years old and a high school graduate. After 14 months in the U.S. Marine Corps, he received an honorable medical discharge with a 20% disability rating for tibial stress fractures. He last received treatment for the fractures in about April 1999 at the Veterans Administration hospital. Prior to starting his work in the shipyard, Mr. Brandon was employed by various retailers as a loss control manager. In other employment, he injured his fingers twice .

When he first started working with Marinette Marine in May of 1998, he was employed as a ship fitter. Between May 1998 and February 1999, Mr. Brandon only suffered injuries to a finger and his elbow. Other than his leg problem, he had no health complaints. As a ship fitter, Mr. Brandon used various industrial tools and cranes to put steel plates together to make a ship. His work required constant bending and lifting of items up to 50 pounds about half the time.

Around 6:00 p.m., on February 12, 1999, Mr. Brandon was assisting Mr. Zablocki weld some steel plates just aft of the ship's bow section. Standing near the top of a six foot ladder, which was resting against the ship construction frame, Mr. Brandon applied ceramic tape on the opposite side of the plates' joint to Mr. Zablocki. Once the tape was in place, Mr. Zablocki would fill the gap between the plates with weld. In that position, they could see each other. Mr. Brandon was wearing steel toe boots with rubber soles. After putting the tape in place, Mr. Brandon began his descent down the ladder so Mr. Zablocki could start welding. The ladder was near a triangular hole which Mr. Brandon had to straddle as he got off the ladder. When Mr. Brandon put his right foot down, it slipped on some blasting sand and his right leg went down the hole, causing him to strike his tail bone and lower back on the edge of the hole. Mr. Zablocki asked if he was okay. At the time, Mr. Brandon was only a little stiff. However, as time wore on, Mr. Brandon's back became stiffer. Mr. Brandon informed his supervisor, Mr. Prevain, of the accident and went to the local emergency room for treatment.

Eventually, Mr. Brandon was treated by Dr. Mack who prescribed rest, medication and physical therapy. Dr. Mack diagnosed a possibly torn muscle and back strain. Mr. Brandon was treated by Dr., Mack though March 1999.

On March 23, 1999, based on Dr. Mack's referral, Mr. Brandon saw Dr. Oswald, a rehabilitation specialist. Dr. Oswald prescribed a regime of occupational therapy sessions and a home exercises. Around that time, his work restriction involved no lifting greater than 20 pounds at first; later the weight increased to 50 pounds. In April 1999, Mr. Brandon was permitted to return to work. He conducted inventory and drove a forklift. Eventually, he was able to return to his duty as a ship fitter. After several months, Dr. Oswald referred Mr. Brandon to Dr. Van Saders. In September 1999, when Mr. Brandon saw Dr. Van Saders, the physician continued to prescribe rest and home exercises.

In the early evening of December 12, 1999, Mr. Brandon was laying back in a recliner, with the foot rest up, watching a football game on television. As he got out of the chair, Mr. Brandon pushed the foot rest handle down with his hand, kicked the foot rest down and pushed against the chairs arms. According to Mr. Brandon, "as I came up, I felt a pop in my back." It came from the lower portion of his back, centered just above his buttocks. The sound was similar to cracking a knuckle or ankle and he felt pressure in his back. Mr. Brandon experienced pain at a level of nine or ten on a scale of one to ten. The last time he had experienced such pain occurred when he slipped and fell into the hole at work. He could not straighten up and had to take baby steps to walk. Later that evening, a friend drove him to the emergency room. The physician gave him pain and muscle relaxer shots.

Instead of going to work the following Monday, Mr. Brandon called work and told them he was staying home due to his back incident. Eventually, his pain improved somewhat to the level of about six. Just before the Christmas holidays, due to his need for money, Mr. Brandon returned to work at his regular duties. His partner helped take up some of the slack. In late December 1999 or January 2000, Mr. Brandon returned to Dr. Van Sadlers and described the incident. Dr. Van Sadlers imposed lighter work restrictions on his employment.

On February 14, 2000, Mr. Brandon was working with Mr. Vieth, welding modules together to construct an Navy barge. He climbed a ladder to accomplish an overhead weld along a module seam. As he was holding the welding device over his head about six or seven inches, he felt a popping sensation in his low back, just above his buttock, in the same area he had injured in February 1999. Mr. Brandon climbed off the ladder, told Mr. Vieth about his back problem, and informed his supervisor. After a 15 minute break, Mr. Brandon worked the rest of his shift.

Mr. Brandon took the next two days off and then unsuccessfully attempted to return to work. He was unable to climb ladders and stairs. When Mr. Brandon saw Dr. Van Sadlers, the doctor characterized his December 1999 and February 2000 back incidents as flare-ups. Dr. Van Sadlers left the decision of back surgery to Mr. Brandon. If Mr. Brandon could handle the pain, there was no need for surgery. After an MRI and another meeting with Dr. Van Sadlers on March 7, 2000, Mr. Brandon decided to undergo a spinal fusion and still wants to go through with the procedure.

Mr. Brandon was called back to work in July 2000 and has not missed a day due to his back problem. His present duties at Marinette Marine include driving a forklift, handling material, and storing items in warehouses. On bad days, when his pain is level is about an eight, Mr. Brandon has trouble moving and experiences pain when walking. On good days, Mr. Brandon is just aware of the pain. The pain goes down the back of his legs to his knee. He also has pain in this hips.

[Cross Examination - Mr. Powers] After the February 12, 1999 injury, Mr. Brandon initially felt pain in his legs but the principal complaint was low back pain. The leg pain seemed to be resolved. However, due to the stress fractures, Mr. Brandon has constant aching inside his legs. Because of the treatments he received from February 1999 to December 1999, Mr. Brandon's back improved and he was

experiencing less pain. Ultrasound treatments, pain medication, and anti-inflammatory medication helped his condition. When he returned to work, his restriction included no lifting weights greater than ten pounds, and no bending, climbing, or standing. Dr. Oswald raised the lifting limit to 20 pounds and Dr. Van Saders lifted the limitation to 30 pounds. By the summer, Dr. Van Saders permitted some bending, twisting, and stair climbing. The physician gave him permission to play softball. He played partial games at third base.

By September 17th, Dr. Van Saders raised the lifting restriction to 50 pounds. Mr. Brandon reported his back was feeling better and he had no radiating pain in his legs. So, between September 17th and December 19th, Mr. Brandon was able to perform most of his regular duties involving welding at Marinette Marine. At the same time, his partner still did most of the heavy lifting. With Dr. Van Saders' permission, he also bowled during this period. Prior to December 1999, Dr. Van Saders had never really recommended back surgery because Mr. Brandon was not experiencing any severe leg pain.

When getting out of the chair in December 1999, Mr. Brandon felt pain in his back right after he heard the popping sound. He also experienced some pain down the back of his legs and was out of work for over a week. When Mr. Brandon saw Dr. Van Saders in January 2000, the doctor still didn't recommend surgery.

Prior to the February 2000 back event, Mr. Brandon had occasionally welded sections of barges together without incident. When he felt the pop in his back on February 14th, the pain took his breath away. When he woke up the next morning, he had severe back pain and his girlfriend called Dr. Van Saders. The radiating leg pain was more severe. After examining an MRI, and listening to Mr. Brandon's pain complaints, Dr. Van Saders prescribed pain medication and stated it was probably time for back surgery.

When Mr. Brandon returned to work in July 2000, Dr. Van Saders limited him to sedentary work. Although he did not play softball, Mr. Brandon did bowl that summer with a 15 pound bowling ball. Dr. Van Saders gave him permission for that activity for exercise purposes.

[Cross Examination - Mr. Sujack] When Mr. Brandon was tack welding on February 14, 2000, he stood on an "A" frame ladder and reached up about 45 degrees to weld a spot about 18 inches away. Between December 1999 and February 2000, Mr. Brandon's partner was Mr. Vieth. Mr. Brandon did about 85% of the welding and Mr. Vieth did most of the plate fitting, which is the harder work.

[Cross Examination - ALJ] When Mr. Brandon joined the Marines, they did not discover any physical problems with his back. He had seen a physician twice in the five years previous to the February 1999 incident for back problems, but the problem was higher up his back and not near the injury site. While he did not sit very often in the recliner, Mr. Brandon doesn't recall doing anything different on December 19, 1999 to cause the back pain.

[Re-direct Examination] Prior to the February 1999 accident, Mr. Brandon had never injured his back.

[Re-cross Examination - Mr. Powers] Mr. Brandon saw a physician about back muscle strain in 1998.

Mr. Mark Zablocki
(TR, pages 93 to 97)

On February 12, 1999, Mr. Zablocki was working with Mr. Brandon at Marinette Marine, fitting two ship plates together. Mr. Brandon was on the outside of the hull placing ceramic tape and Mr. Zablocki was working inside the hull. Mr. Zablocki heard Mr. Brandon fall and call out that he had hurt his back. When Mr. Zablocki went to see what happened, he found Mr. Brandon sitting on a the jig platform. Mr. Brandon stated that he had slipped on sandblasting grit and hurt his back. When Mr. Brandon got up and walked, he appeared to be in pain. Mr. Brandon stopped work and reported the injury to the supervisor.

Mr. Owen L. Vieth
(TR, pages 97 to 106)

[Direct Examination] Mr. Vieth worked with Mr. Brandon at Marinette Marine from June 1999 through February 2000. As the journeyman, Mr. Vieth ensured the proper alignment of ship plates, and did the heavy work. Mr. Brandon was his helper. Mr. Brandon occasionally wore a back brace covering the lower part of his back. At times, Mr. Brandon would hunch over.

On February 14, 2000, they were placing two sections of a barge together. Mr. Brandon was using a ladder to do some high tacking. When he stepped off the ladder, Mr. Brandon stated he was in pain. He then hunched over, holding his lower back. Although his back was hurting him again, Mr. Brandon was able to finish the shift.

[Cross Examination - Mr. Powers] Mr. Brandon complained about back pain daily. Concerning Mr. Brandon's legs, Mr. Vieth does not remember any leg pain complaints by Mr. Brandon. He did mention a shin problem in the Marines. Mr. Vieth is Mr. Brandon's friend. He knows that Mr. Brandon bowls. At the end of the shift on February 14, 2000, Mr. Brandon mentioned his back pain to their supervisor. The incident occurred early in the shift.

Documentary Evidence Presented by the Claimant

Medical Records, Opinion, and Deposition - Dr. Christopher J. Van Saders (CX 1 and CX 6)

Dr. Van Saders, a board certified orthopedic surgeon, treated Mr. Brandon from May 24, 1999 through August 2000. The early part of the medical record documents Dr. Oswald's referral to Dr. Van Saders. At the first examination, Mr. Brandon described the February 12, 1999 accident and indicated that the initial leg pain had been resolved. His back pain had also improved to the point that it was tolerable. Upon physical examination, Dr. Van Saders found good forward flexion of the back. Straight leg rises caused back pain but not leg pain. A February 1999 x-ray revealed grade 1 spondylolisthesis⁶ at L5 on S1 with bilateral spondylolysis⁷ at L5. A May 1999 bone scan showed the absence of any acute spondylolisthesis. Dr. Van Saders diagnosed lumbar strain and pre-existing bilateral spondylolysis at L5 and spondylolisthesis at L5 on S1 secondary to the bilateral spondylolysis. He imposed a lifting restriction of 50 pounds.

On December 13, 1999, Mr. Brandon telephoned Dr. Van Saders' office for an appointment. Mr. Brandon had a lot of lower back pain and been treated in an emergency room the previous night. He couldn't stand up or walk. On December 14, 1999 Dr. Van Saders restricted Mr. Brandon from work until January 7, 2000 due to the back pain. Yet, on December 21, 1999 when since Mr. Brandon stated he was feeling better and requested to return to work, the physician released him to work the next day, December 22, 1999, at medium work level.

On January 7, 2000, Dr. Van Saders again examined Mr. Brandon and characterized the December 12, 1999 back incident as a "flare up." The doctor indicated that the lumbar strain had exacerbated a pre-existing spondylolisthesis at L5 on S1 without radicular pain in the legs. Dr. Van Saders intended to continue the medium level work restriction and conservative treatment plan. He advised against back surgery due to the potential for residual pain.

On February 14, 2000, Mr. Brandon called Dr. Van Saders' office to report that his back pain was getting worse, similar to the pain at Christmas, and he couldn't bend over. Dr. Van Saders restricted him from work for two days. On February 18, 2000, Mr. Brandon called again to report shooting pain down his buttocks to his legs.

⁶Forward displacement of one vertebra over another (fifth lumbar vertebra slips forward on first sacral vertebra). DORLAND ILLUSTRATED MEDICAL DICTIONARY 1563 (28th ed. 1994).

⁷Dissolution of vertebra. *Id.*

Dr. Van Saders examined Mr. Brandon on February 18, 2000 and recorded that Mr. Brandon had experienced a “flare up” on February 7, 1999⁸ doing overhead welding. This flare up involved more leg symptoms. Dr. Van Saders intended Mr. Brandon to return to work on February 28 with sedentary work restrictions. Since Mr. Brandon was experiencing more leg problems, Dr. Van Saders left the decision about fusion surgery to Mr. Brandon. However, the doctor also ordered an MRI before making a final decision.

A February 23, 2000 MRI showed a left side disc protrusion at L5 “with an extruded fragment which impinges upon the left S1 nerve root and probably displaces it slightly dorsalward.”

On March 7, 2000 Dr. Van Saders reviewed the MRI results with Mr. Brandon and discussed the risks associated with, and potential outcome of, spinal fusion surgery. Mr. Brandon elected to proceed with the surgery which was scheduled for March 30, 2000.

On March 21, 2000, Mr. Brandon cancelled the surgery appointment since he was unable to schedule an appointment with the physician designated by the insurance company for a second opinion until after March 31st.

On a July 18, 2000 light duty work restriction work sheet, Dr. Van Saders imposed a lifting restriction of 30 pounds.

After a July 28, 2000 examination, Dr. Van Saders indicated that Mr. Brandon could return to light sedentary work because “he is pretty much back to where he was before he had another recent exacerbation.” On August 1, 2000, Dr. Van Saders released Mr. Brandon to sedentary work and noted that he could drive a forklift.

In an October 11, 2000 deposition, attended by all three counsel, Dr. Van Saders further elaborated on his treatment of Mr. Brandon and his assessment of his back problem. At the first treatment, Mr. Brandon denied any prior history of back pain and reported that when he fell on February 12, 1999, he twisted his back and hit his tail bone. In addition to low back pain, Mr. Brandon experienced some leg pain, but other than some occasional numbness, the leg pain went away. At the time of his visit, the pain was tolerable. Upon examination, Dr. Van Saders found Mr. Brandon had a good range of motion. His leg raises were positive for back pain and negative for leg pain. An x-ray disclosed that the L 5 bone was sliding forward over the S 1 bone. This condition is called spondylolisthesis and in Mr. Brandon’s case it is caused by an old (as established by a bone scan) crack in his L 5 bone (called spondylolysis). Because spondylolisthesis is not always symptomatic, some people do not even know they have the problem. Since Mr. Brandon did not have severe leg symptoms, surgery was not warranted. Instead, Dr. Van Saders

⁸Since Mr. Brandon had not even suffered a back injury prior to February 12, 1999, and based on the other evidence in the record, including Dr. Van Saders’ subsequent deposition testimony, I consider this reference in the treatment record to be related to Mr. Brandon’s February 14, 2000 incident while welding overhead.

believed an exercise program to strengthen Mr. Brandon's abdomen and back muscles would help stabilize his spine. Dr. Van Saders also intended to return Mr. Brandon to work.

At a September 1999 examination, Mr. Brandon reported that lifting aggravated his back pain. However, he did not have any leg pain. Around December 13, 2001, Mr. Brandon called the doctor about severe back pain that precluded his ability to stand up. Within a week, the condition improved and at Mr. Brandon's request, Dr. Van Saders approved his return to work.

At a January 7, 2000 examination, Mr. Brandon described his flare up that occurred at home on December 12, 1999. Dr. Van Saders advised that surgery for back pain alone was not advisable because even after the procedure most people experienced residual pain.

When Mr. Brandon returned in February 2000, he reported more leg symptoms and another flare up on February 14, 2000. He was experiencing shooting pains in his legs. So, Dr. Van Saders ordered an MRI to determine if there were any other back problems. In light of the flare up, he also placed Mr. Brandon on a sedentary work restriction. The MRI indicated Mr. Brandon was not experiencing degeneration of his spine. The test did show a bulge or protrusion, rather than a herniation, of the disc at the L5 - S 1 region that was consistent with spondylolisthesis.

Since Mr. Brandon was still having the same symptoms in March 2000, Dr. Van Saders discussed the risks and limitation of back surgery with him. The fusion surgery involves removing the broken piece of bone that is pinching the nerve and then getting the two spinal bones to grow together. Mr. Brandon is a good candidate for the surgery. Dr. Baek who Mr. Brandon saw for a second opinion agrees that surgery is appropriate.

By July 2000, the surgery still had not been accomplished due to insurance issues. Since conservative treatment had failed, Dr. Van Saders kept Mr. Brandon on sedentary work restrictions with a 30 pound lifting limitation. Mr. Brandon is also precluded from doing yard work because he had experienced a back flare up doing that activity. Dr. Van Saders believes Mr. Brandon will not reach maximum medical improvement until the surgery is accomplished.

In Dr. Van Saders' opinion, the February 12, 1999 accident exacerbated Mr. Brandon's pre-existing spondylolisthesis and "nothing has been fixed since then." Mr. Brandon suffered an initial injury and has experienced numerous flare ups, including increased back pain and leg symptoms, since then. According to Dr. Van Saders, "everything stems from that initial problem in February of 1999." Without surgery, Mr. Brandon's condition is not likely to improve.

The February 12, 1999 accident did not cause either the spondylolisthesis or the spondylolysis. It's unlikely that Mr. Brandon's spinal bone fracture (spondylolysis) was caused by acute trauma. Instead, it is probably a developmental problem. Spondylolisthesis may deteriorate through the natural aging process and its symptoms may develop. An individual does not necessarily need a traumatic event to bring on the

symptoms of spondylolisthesis.

On the other hand, spondylolysis does not develop further. Once the bone is broken, it's broken. Possibly, Mr. Brandon's spondylolisthesis can worsen with normal wear and tear, especially impact activities. If the spondylolisthesis is just causing back pain, it is not causing a lot of irritation of the nerves and surgery is not warranted. But, if it is aggravating the nerves, then leg pain, which is similar to nerve root impingement pain, occurs and surgery is the typical remedy. The aggravation may come about if the bone slips further forward and compresses the nerve even more. Only about two to five percent of the population has Mr. Brandon's type of spondylolisthesis. Of those individuals about ten to fifteen percent have surgery.

[Dr. Van Saders answered, "correct" when asked if Mr. Brandon experienced an aggravation when he got out of his chair. But, then in response to Mr. Powell's question as to whether Dr. Van Saders needed to know the mechanics Mr. Brandon used in getting out of the chair in December 1999 to determine whether that event was an additional trauma or injury to his back or the spondylolisthesis condition, he answered:] "I mean if he was trying to lift a 250 pound object when he was getting out of the chair, sure. But, if he was just getting out of the chair, no." If Mr. Brandon heard a "pop," it was probably the bone sliding a little bit and not an additional injury to the area. The pop itself is insignificant. The act of flexing the spine in getting out of a chair, a normal everyday event, may aggravate or strain a pre-existing spondylolisthesis.

When Mr. Brandon fell on February 12, 1999, he sustained a strain to his back, which involves the muscles, ligaments and disc. Based on Dr. Oswald's treatment notes, Dr. Van Saders believed Mr. Brandon improved somewhat and then reached a plateau without totally healing. In his first examination, Dr. Van Saders reported no radicular pain; however, Mr. Brandon's complaint of numbness in his feet is "a little bit radicular." He really didn't experience the radicular pain until after the February 14, 2000 flare up. Dr. Van Saders made that diagnosis based on Mr. Brandon's subjective complaints.

Mr. Brandon's spondylolisthesis is grade 1 out of 5, and represents up to a 25% slippage. Dr. Van Saders recommends surgery because Mr. Brandon has both back and leg pain. Through the fall of 1999 and January 2000, Dr. Van Saders didn't alter Mr. Brandon's work restriction which permitted lifting up to 50 pounds. After February 2000, Dr. Van Saders placed him on sedentary work restriction with a 30 pound lifting limitation.

When Mr. Brandon was doing overhead welding in February 2000, he was hyper extending his back. [In response to Mr. Powell's question whether the hyper extension would cause further damage or injury to the back, Dr. Van Saders stated,] "Can aggravate a spondylolisthesis, yeah." The flare up or injury aggravated his pre-existing spondylolisthesis. It exacerbated his spondylolisthesis and accelerated it by producing leg pain symptoms, by causing further damage to the nerves. Any significant hyper extension of Mr. Brandon's back could aggravate his pre-existing spondylolisthesis.

In Dr. Van Saders' opinion, "There has been some aggravation of the initial accident . . . [of] . . . '99 from the accident in 2000. Yes. Once again, he had never ever completely healed from the accident of '99." Consequently, Mr. Brandon's present condition is not due solely to the natural progression of his injury from February of 1999. Instead, while it's a "gray" area and Mr. Brandon's daily activities would cause minor exacerbations, Dr. Van Saders concludes that Mr. Brandon's present condition "is a combination of both injuries, February of '99 and February of 2000." Both events are contributing factors. At the same time, the events of December 1999 and February 2000 do not "completely" eliminate the incident of February 1999 as a cause of Mr. Brandon's condition.

In a manner similar to his work restrictions, Mr. Brandon's daily activities should be restricted. If bowling bothers him, he shouldn't do it. Mr. Brandon may experience additional flare ups and increased symptoms. In July 2000, Dr. Van Saders added a work restriction of only occasionally reaching over the shoulders for Mr. Brandon because his overhead welding had exacerbated his spondylolisthesis in February 2000.

After the MRI eliminated the possibility of any other back problems, Dr. Van Saders recommended surgery because Mr. Brandon was experiencing leg pain and numbness, which was different from the shin splints, and Mr. Brandon had resumed the need for pain medication.

Medical Records - Bay Area Medical Center
(CX 2)

These records cover Mr. Brandon's treatment at the Bay Area Medical Center from June 26, 1995 through December 13, 1999.

In June 1995, Mr. Brandon was evaluated for chronic pain in his right tibia. He had a history of a stress fracture in 1989 but the examination did not disclose any abnormal results.

An hour after his fall at work on February 12, 1999, Mr. Brandon was treated in the hospital emergency room. Mr. Brandon complained about severe bilateral back pain. He assessed his pain level as 7 out of 10, with the pain worsening upon movement. The attending physician noted tenderness in low lumbar muscles. Forward flexing, and rotation, of his back caused pain. The radiographic film showed no fracture or spinal compression. The doctor diagnosed severe low back strain and administered a pain injection.

Between February and April 1999, Mr. Brandon received physical therapy at the hospital. The purpose of the program was lumbar spine stabilization. He started the program at a pain level of 5 to 6. At completion, Mr. Brandon reported minimal low back pain, with soreness at the end of the day.

In the late evening of December 12th and early morning of December 13th, Mr. Brandon was treated in the hospital emergency room for acute low back pain. That evening Mr. Brandon experienced

low back pain as he exited a recliner. He reported the initial pain level to be at 10 out of 10; however there was no radiation to the legs and upon examination, the attending physician found good strength and tone in the lower extremities. The doctor also recorded the original injury as February 12, 1999 and noted spondylolisthesis in Mr. Brandon's medical history. An x-ray indicated that L5 was "somewhat anterior" to S1. Even after the first round of pain injections, Mr. Brandon still reported a pain threshold of 6. After another round of injections, Mr. Brandon was sent home at two in the morning with more pain medication and muscle relaxers. The physician, Dr. Stephen C. Caselton, diagnosed low back pain.

Medical Records - Dr. Theresa A. Oswald
(CX 3)

Dr. Oswald, board certified in physical medicine and rehabilitation,⁹ first evaluated Mr. Brandon in the later part of March 1999 based on a referral from Dr. Mack. She documented Mr. Brandon's accident and noted that the emergency room x-rays revealed minimal spondylolisthesis at L 5 with a 3 millimeter anterior subluxation. In the past, Mr. Brandon had suffered stress fractures in his legs but he had no prior history of back pain. Mr. Brandon reported that he had constant achy pain which increased with prolonged standing or walking. His worst pain came at the end of the day.

Upon examination, Mr. Brandon's lower extremities and the straight leg lift tests were normal. Mr. Brandon could rotate about his spine but lumbar spine extension caused pain. He also experienced tenderness in the S1 area. Dr. Oswald found these symptoms consistent with spondylolisthesis but she could not determine whether the problem was new or old. Dr. Oswald recommended a lumbar spine stabilization program and use of a back brace. Although she preferred a conservative treatment approach, Dr. Oswald opined that Mr. Brandon "may need surgery down the road if his symptoms do not improve" in about six months and non-operative methods failed.

About a month later, Mr. Brandon reported that his pain was better. He liked forklift driving because the job permitted him to shift positions. In her examination, Dr. Oswald found normal strength in his legs and continued tenderness at L 5 and S 1. A bone scan had revealed a non-healing stress fracture in his leg. Dr. Oswald upgraded his work status from sedentary to light-duty and prescribed the use of a back brace.

At the end of May 1999, Dr. Oswald performed her last examination of Mr. Brandon. By that time, Mr. Brandon had returned to work in a light duty capacity but he found stair climbing aggravated his symptoms. In addition, Mr. Brandon reported numbness in his feet about two or three times a week. The examination revealed normal lower extremities and tenderness over the S 1 joint bilaterally and in the L 5 region of the mid-back. Dr. Oswald noted a recent bone scan had discovered a subtle degenerative spinal change and non-healing stress fractures in his leg. Dr. Oswald found it difficult to determine whether Mr.

⁹I take judicial notice of Dr. Oswald's board certification and have attached the certification documentation.

Brandon's spondylolisthesis was "directly related to injury on February 12, 1999 when he slipped and fell into a hole. Yet, since Mr. Brandon had no history of back pain prior to the accident, "his current symptoms are related to the fall." She deferred any opinion on maximum medical improvement and Mr. Brandon's ability to return to his former duties pending further evaluation by a spinal specialist, Dr. Van Sadlers.

Medical Records - Finger Injury
(CX 4)

Due to a work-related injury to his right index finger, Mr. Brandon suffered a permanent partial disability of 10% to his right index finger.

Medical Records - Veterans Administration
(CX 5)

The Veterans Administration ("VA") medical records document Mr. Brandon's struggle with stress fractures in his legs. Since at least November 1995, Mr. Brandon has experienced chronic, episodic pain in his legs due to unresolved stress fractures, as confirmed by multiple bone scans. The degree of leg pain is apparently associated with the extent of his physical activity. In April 1999, Mr. Brandon reported less leg pain and noted that due to a recent back injury his activity at work and home had decreased. Due to multiple non-compensable disabilities (the stress fractures), the VA found Mr. Brandon has a service connected disability of 10%.

Documentary Evidence Presented by the Employer

Medical Report, Opinion, and Deposition - Dr. Paul Baek
(EX 1, EX 2, EX 4, and EX 5)

Dr. Baek, board certified in neurosurgery, evaluated Mr. Brandon in April 2000. After taking Mr. Brandon's back injury history, Dr. Baek found on physical examination that Mr. Brandon's back was "nontender" and his lower extremities had normal strength and sensitivity. Dr. Baek also review an MRI which displayed a bulging disk at L5 - S1, spondylolysis "without significant listhesis." In his opinion, since conservative care of Mr. Brandon's L5 - S1 spondylolysis had failed and he continued to experience chronic pain, a posterior fusion might be appropriate. Prior to making a final decision on back surgery, Dr. Baek needed more radiographic studies. In a separate letter to a CIGNA/Frank Gates Acclaim representative, Dr. Baek stated that Mr. Brandon's back pain was a "natural progression of his original injury." Since conservative treatment had failed, "surgery is appropriate." In a November 1, 2000 deposition, Dr. Baek attempted to provide further elaboration of his opinion. At the request of Dr. Van Sadlers for a second opinion, Dr. Baek conducted a neurological examination of Mr. Brandon on April 24, 2000. He reviewed Dr. Van Sadlers' notes, Mr. Brandon's case file, and physically examined Mr. Brandon. The examination was unremarkable, without any observable abnormalities. An MRI showed

L5 - S1 spondylolysis. Since conservative treatment of his low back pain had failed, Dr. Baek agreed with Dr. Van Saders that surgery was warranted. At the same time, Dr. Baek disagreed somewhat with Dr. Van Saders about the best approach for the surgery. Dr. Baek felt a fusion at L5 - S1 without an upper level laminectomy would be sufficient.

Mr. Brandon's back condition is work-related. In February 1999, he probably suffered a back strain superimposed on a pre-existing spondylolysis. In addition to the spondylolysis, Mr. Brandon does have some slippage of the disk but it's not significant. Spondylolysis can deteriorate through natural aging and be aggravated by everyday activities. The principal criteria for Dr. Baek's recommendation of back surgery is that conservative treatment has not successfully addressed the chronic back pain.

[When the various attorneys attempted to focus Dr. Baek's expertise on the principal issues in this case, and asked questioned about natural progression, aggravation and new injury, he became confused as to the dates and the incidents, and was unsure of his answers. Although Dr. Baek had reviewed Dr. Van Saders' notes and Mr. Brandon's case file, the physician demonstrated a lack of command of the information in those records. For example, Dr. Baek was unaware that Mr. Brandon had played softball or bowled]. Dr. Baek couldn't really answer the question of whether the February 2000 incident was a new type of injury. After some hesitation, he expressed that it might have aggravated, and combined with, the February 1999 injury. However, he then stated, "But, I'm not quite sure that is true. I don't know the answer." Likewise, Dr. Baek couldn't say whether the lifting of some work restrictions indicated that Mr. Brandon had improved since the initial accident. Dr. Baek stressed a couple of times that he only saw Mr. Brandon once; whereas, Dr. Van Saders had treated Mr. Brandon numerous times. As a result, Dr. Baek deferred to Dr. Van Saders. Based on his extensive contact with Mr. Brandon, Dr. Van Saders would have a "better feeling" for the entire "episode."

The chair incident could've aggravated his back problem. But, most physicians recommend patients with this type of problem continue with their daily routine as best as possible.

Response - Dr. Van Saders
(EX 3)

On May 19, 2000, a case manager sent Dr. Van Saders a letter requesting that he select the "more appropriate" scenario between two possibilities. The first response stated:

I feel that Mr. Brandon has had a progression of his back pain with regard to the original injury which was initially sustained on 2/12/99. I feel that this was a natural progression of the original injury and not a new injury.

The second possible scenario read:

I do not feel that this is a natural progression of his original injury of 2/12/99, but rather that it is a new injury stemming from incidents of getting up from a recliner chair at his home on 12/12/99 and experiencing acute low back pain and also a new incident on 2/14/00 where he again began experiencing low back pain. In other words, I feel that this is a new incident separate from the original back injury of 2/12/99.

Between these two possibilities, Dr. Van Sadlers checked the first scenario indicating Mr. Brandon was experiencing a natural progression of his original February 12, 1999 back injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Stipulations of Fact

The Employer, Marinette Marine (through Mr. Powers), and Mr. Brandon stipulated to, and I find, the following facts: a) on February 12, 1999 Mr. Brandon suffered a work-related injury; and, b) at the time of the injury, Mr. Brandon's average weekly wage was \$368.75 with a corresponding weekly compensation rate of \$244.84. (TR, pages 19 and 20).¹⁰

Preliminary Findings

Under the Act, 33 U.S.C. § 902 (2), a compensable "injury" is defined as an accidental injury arising out of and in the course of employment. The courts and Benefits Review Board ("BRB" or "Board") have provided substance and boundaries to this definition through numerous interpretations. First, injury means some physical harm in that something has gone wrong with the human frame. *Crawford v. Director, OWCP*, 932 F. 2d 152 (2d Cir. 1991). Credible complaints of subjective symptoms and pain may be sufficient to establish such physical harm. *Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981). Second, a work-related aggravation of a pre-existing condition is an injury under the Act. *Preziosi v. Controlled Indus.*, 22 BRBS 468 (1989). Third, to be a compensable injury under the Act, the employment-related injury need not be the sole cause, or primary factor, in a disability. If an employment-related injury contributes to, combines with, or aggravates a pre-existing or underlying condition, the entire disability is compensable. *Strachen Shipping v. Nash*, 782 (5th Cir. 1986) and *Kooley v. Marine Indus. N. W.*, 22 BRBS 142 (1989). Fourth, even if the claimant's employment aggravates non-work-related, underlying disease or condition so as to produce incapacitating symptoms, the resulting disability is compensable. *Gardner v. Bath Iron Works Corp.*, 11 BRBS 556 (1979) *aff'd sub nom. Gardner v. Director, OWCP*, 640 F.2d 1385 (1st Cir. 1981). Thus, the term "injury" includes

¹⁰For future reference, Mr. Lenz stated in his closing brief (page 7, footnote) that after the hearing the parties agreed Mr. Brandon's average weekly wage on February 14, 2000 was \$537.03, with a corresponding compensation rate of \$358.02.

aggravation of a pre-existing, non-work-related condition or the combination of work- and non-work-related conditions. *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990).

If a claimant establishes the existence of an injury, as defined by the Act, and the occurrence of a work-related accident that could have caused the injury, the courts and Benefit Review Board have interpreted Section 20 (a) of the Act, 33 U.S.C. § 920 (a), to invoke a presumption on behalf of a claimant that, absent substantial evidence to the contrary, the injury was caused by the work-related accident. To rebut this presumption, the employer must present specific medical evidence proving the absence of, or severing, the connection between the bodily harm and the employee's working condition. *Parsons Corp. v. Director, OWCP (Gunter)*, 619 F.2d 38 (9th Cir. 1980).

With these principles in mind, I first note that Mr. Brandon had a pre-existing back defect prior to his February 12, 1999 fall at work. Based on Dr. Van Saders' well documented and reasoned interpretation of the May 1999 bone scan,¹¹ I find Mr. Brandon had a defect at L5, or spondylolysis of that vertebra, prior to February 12, 1999. The opinions of three physicians, Dr. Van Saders, Dr. Oswald, and Dr. Baek, also establish that Mr. Brandon suffered some slight slippage of L5 over S1, or spondylolisthesis. While none of the doctors definitively demonstrated that the spondylolisthesis existed prior to February 12, 1999, Dr. Van Saders related the spondylolisthesis to the spondylolysis, which was not caused by the traumatic fall and instead involved the development of the bone. Additionally, the un-refuted and credible testimony of Mr. Brandon establishes that he did not have any back problems prior to February 12, 1999.

Next, on February 12, 1999, Mr. Brandon was working at Marinette Marine as a ship fitter. As a ship fitter, Mr. Brandon was fairly mobile, climbing stairs, platforms and ladders. His duties involved heavy lifting, extensive bending, and fitting and welding steel plates together in the construction of ships. In the early evening of February 12, 1999, as he descended a ladder after applying ceramic tape to a seam between two plates, Mr. Brandon's right foot slipped on blasting sand. His right foot and leg then went through a hole in a platform and Mr. Brandon fell, striking his tail bone and low back on the hole's edge. As a result of this accident, and again based on Dr. Van Saders' uncontested medical opinion, as supported by Dr. Oswald and Dr. Baek, Mr. Brandon suffered a back strain which aggravated his pre-existing spondylolysis and led to chronic low back pain and temporarily precluded his return to his usual duties as a longshoreman.

Accordingly, in light of the employer's and employee's stipulation of fact, and considering the preponderance of evidence in the record, Mr. Brandon has proven both the existence of an injury, or bodily harm to his body, and the occurrence of an accident in the course of his employment with Marinette Marine which could have cause the bodily harm. Further, as established by Dr. Van Saders, that injury aggravated

¹¹Dr. Baek was not very familiar with the circumstances involving this bone scan. Although he was not able to render an definitive opinion as to whether Mr. Brandon's spondylolysis was pre-existing, he did state Mr. Brandon probably experienced a strain superimposed on pre-existing spondylolysis when he fell on February 12, 1999.

Mr. Brandon's pre-existing back condition. Thus, under the presumption of Section 20 (a), Mr. Brandon has established that he suffered a low back injury that arose out of his employment with Marinette Marine. Accordingly, Mr. Brandon is entitled to disability compensation and appropriate medical care for that back injury.

Issue No. 1 - Characterization of December 1999 Back Incident

On December 12, 1999, when leaving a recliner chair, Mr. Brandon experienced significant, and temporarily disabling, low back pain in the same area as his February 12, 1999 back injury. Asserting that the December 1999 back problem is related to his initial work-related injury, Mr. Brandon has claimed compensation under the Act. RSKCO, the Employer's insurer at the time of the original work-related back injury, maintains that the December 12, 1999 injury at home is an intervening cause, or independent event, which severs its responsibility for any disability associated with the December 1999 back problem.

Since Mr. Brandon has proven the existence of a compensable back injury from his February 12, 1999 fall at work, Marinette Marine, and its insurer at the time of the fall, RSKCO, remain responsible for all natural consequences (things going wrong with Mr. Brandon's body) of that back injury, whether they occur at work or outside work, through the presumption under Section 20 (a). *Bludworth Shipyards v. Lira*, 700 F.2d 1046 (5th Cir. 1983)¹² and *Kooley v. Marine Industries, N.W.*, 22 BRBS 142 (1998). On the other hand, as previously noted, an employer and its insurer may sever the work-related connection generated by the statutory presumption, and be relieved of liability for that portion of the disability attributable to the second injury, by presenting either substantial contrary evidence of an absence of a connection, or evidence of an intervening cause, such as an employee's intentional conduct, for the subsequent injury. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140, 144 (1991), *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989), and *Bailey v. Bethlehem Steel Corp.*, 20 BRBS 14 (1987).

The court in *Bludworth*, 700 F.2d at 1050, summarized the interplay of these two concepts as: "[a] subsequent injury is compensable if it is the direct and natural result of a compensable primary injury, as long as the subsequent progression of the condition is not shown to have been worsened by an independent cause." Thus, the central focus becomes whether RSKCO has met its evidentiary burden of providing either a) substantial medical evidence establishing the absence of a connection between the two back incidents; or, b) substantial evidence that Mr. Brandon's act of exiting a recliner chair on December 12, 1999 was an intervening cause sufficient to sever the presumptive link between his back pain on that evening at home and his initial work-related back injury of February 12, 1999.

¹²According to the court, when an employee sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, the employer is liable for the entire disability and for the medical expenses due to both injuries if the subsequent injury is the natural or unavoidable result or consequence of the original work-related injury.

Medical Evidence

The Board has demonstrated the importance of medical opinion to resolve the connection issue between an initial work-related injury and a subsequent non-work-related injury. In two cases involving normal day-to-day activities (leaving a chair and bending over in a yard) the Board relied on the administrative law judge's determination that the preponderance of the medical evidence indicated that no new injury occurred. Instead, the majority of the physicians in the case linked the subsequent injury to the original work-related injury. *Pakech v. Atlantic & Gulf Stevedores*, 12 BRBS 47 (1980),¹³ and *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991).¹⁴

Two physicians considered the connection between Mr. Brandon's December 1999 back problem and his February 12, 1999 fall at work. Without much explanation, Dr. Baek expressed his belief that the December 1999 chair incident could have aggravated Mr. Brandon's bad back. In other words, Mr. Brandon re-injured his back.

Dr. Van Saders' view of the incident is more ambiguous. In his treatment notes, Dr. Van Saders characterized the December 1999 chair incident as a "flare up" of Mr. Brandon's bad back condition which had been aggravated by the February 12, 1999 fall. That terminology implies Mr. Brandon's resulting pain on December 12, 1999 was just a natural consequence of, and connected to, his original work-related injury. Yet, in his deposition, acknowledging the possibility that getting out of a recliner could flex the spine, aggravating pre-existing spondylolisthesis, Dr. Van Saders first agreed that Mr. Brandon had experienced an aggravation of his back condition exiting the chair. That response implies Mr. Brandon suffered a new injury that night. Then again, Dr. Van Saders seemed to move away from the aggravation possibility by later suggesting that the December 1999 chair incident would amount to an aggravation only if Mr. Brandon had been lifting a very heavy object at the same time he was getting out of the chair.

Of these two opinions, I give little or no probative weight to Dr. Baek's opinion because he openly admitted that he knew very little about the December 1999 chair incident and had not really considered

¹³The employee injured his back in January of 1975. Eventually, he returned to work. Then, in August 1976, while getting out of a chair at home, the employee twisted his back and suffered disabling back pain. In a split decision, the Board upheld an administrative law judge's finding that the claimant's back pain upon exiting the chair was a natural progression of the initial injury. The dissenting judge disagreed with the medical findings noting that the treating physician doubted the claimant's veracity and did not believe there was any lingering disability from the initial injury.

¹⁴The claimant suffered a back injury at work in July 1985; experienced recurrent, back pain; returned to work; was laid off; and, then in April 1987, suffered severe back pain while bending over doing yard work. The employer contended the 1987 accident was an intervening non-compensable event. However, the BRB disagreed. Based on the treating physician's opinion that the yard incident did not amount to a new injury, the Board upheld the administrative law judge's finding that the claimant's recurring back problems were a natural and unavoidable consequence of his employment.

it. Instead, Dr. Baek deferred to Dr. Van Saders' assessment because he was the treating physician.

I agree that as Mr. Brandon's treating physician, who helped him with his back condition over a significant period of time, Dr. Van Saders was in an excellent position to provide the better documented opinion. Unfortunately, while Dr. Van Saders' opinion is more probative in terms of documentation, his ambiguity (based primarily on legal causation terminology) about the nature of the December 12, 1999 back incident also diminishes the probative value of his opinion on this issue. On the whole, considering the minimal probative value of Dr. Baek's conclusion, and the less than clear position of Dr. Van Saders on the nature of this back incident, I find the preponderance of the medical opinion fails to establish that Mr. Brandon's back pain on December 12, 1999 was a new injury or a re-injury. As a result, the medical evidence fails to establish the absence of a connection between the two back pain incidents of February 1999 and December 1999.

Intervening Cause

Even though RSKCO is unable to show the lack of a connection between the two back pain events based on medical evidence, Mr. Brandon's own actions might still provide a basis for finding an intervening cause sufficient to cut the presumptive connection under Section 20 (a). As the *Bludworth* court further explained:

an intervening cause may sever the causal connection between an original work-related injury and subsequent consequences a worker may suffer. The employee's own deliberate conduct may constitute such an intervening cause. If the remote consequences are the direct result of the employee's unexcused, intentional misconduct, and are only the indirect, unforeseeable result of the work-related injury, the employee may not recover under the LHWCA. See 1 A. Larson, *The Law of Workmen's Compensation* Sec. 1300 (1980) ("When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to claimant's own intentional conduct."). 700 F.2d at 1051.

Initially, just based on the phrase, "intentional conduct," Mr. Brandon's conscious decision to heave himself out of a reclining chair seems to fit the definition. However, my review of numerous cases concerning subsequent at-home injuries indicates the Board uses a specialized meaning for the phrase "intentional conduct" to determine whether an intervening cause has been established. Essentially, if an employee's subsequent action or inaction is so unreasonable that it is negligent or inexcusable, then the resulting physical harm from such action or inaction interrupts, or cuts off, the natural and unavoidable link between the employee's condition after the action or inaction and the initial work-related injury. So, in a subsequent non-work-related injury situation, the BRB queries whether the claimant has taken reasonable precautions in his weakened condition to guard himself against re-injury, since a negligent act may serve as an intervening cause such that the subsequent injury does not naturally and unavoidably result from the

initial work injury. *Grumbley v. Eastern Associated Terminals Co.*, 9 BRBS 650 (1979) and *Marsala v. Triple A South*, 14 BRBS 39 (1981).

For example, in *Grumbley*, 9 BRBS 650, the Board found a formerly-injured employee's negligence a sufficient basis to deny compensation benefits for a subsequent at-home injury. In that case, the claimant injured his right knee at work in April 1975 and received a 15% permanent partial disability award. Eighteen months later, while placing an antenna on the roof, his right knee gave way and the claimant fell injuring his left leg. The claimant then sought additional compensation for the injury to his left leg. A split Board, in reversing the administrative law judge's compensation award, noted that since the injury to his right knee at work, the employee's knee had given out a few times. As a result, he was on notice that his weakened right knee was susceptible to collapsing. Consequently, by climbing on the roof with knowledge of an unstable knee, the claimant failed to act reasonably to protect himself from further injury.¹⁵

Likewise, an inexcusable inaction by a formerly injured employee may also serve as a basis for finding an intervening cause. In *Bludworth*, 700 F.2d 1046, the court found as an intervening cause an employee's intentional failure to disclose a drug addiction problem to a treating physician.

With these examples in mind, I find Mr. Brandon's decisions to first sit in, and then get out of, a recliner were neither negligent nor inexcusable. By December 1999, although Mr. Brandon continued to suffer back pain, the pain had moderated to the extent that Dr. Van Saders permitted him to return to work. At work, he had eventually resumed his ship fitter functions. Additionally, notably absent in Dr. Van Saders' treatment of Mr. Brandon's back condition was any restriction concerning the use of reclining chairs. In fact, Dr. Van Saders characterized Mr. Brandon's chair action as a normal, everyday activity. And, up until December 12, 1999, Mr. Brandon had not really suffered any back problems relating to chairs. Consequently, absent any knowledge that the act of getting out of a chair could cause a flare up of back pain, Mr. Brandon acted reasonably on December 12, 1999 when he pushed up out of the recliner chair. Even considering the condition of his back, Mr. Brandon's choice of chairs on December 12, 1999 fails to rise to the level of an intervening cause. I find his action of getting out of the recliner does not sever the presumptive link between the resulting back pain and disability he experienced on that day and his initial February 12, 1999 fall at Marinette Marine, when RSKCO was the insurer.

¹⁵The dissenting judge would've have upheld the administrative law judge's determination that the claimant was not negligent, especially since the claimant had been released back to work without restrictions. Additionally, based on the nature of the Act, the dissenting judge would require something more than simple negligence, such as reckless action, to break the chain of causation and relieve the employer of responsibility for the claimant's subsequent condition.

Summary

The medical evidence doesn't show the absence of a connection between the two back pain events of February 1999 and December 1999. Likewise, Mr. Brandon's decisions to sit in a recliner and then get up were not unreasonable such that his conduct amounted to an intervening cause. Consequently, Marinette Marine and its insurer, RSKCO, have failed to meet their burden of providing substantial evidence to rebut the Section 20 (a) presumption that Mr. Brandon's back pain on December 12, 1999 and its associated disability were related to this back injury that he suffered at work on February 12, 1999.

Issue No. 2 - Characterization of the February 14, 2000 Back Incident

On February 14, 2000, while doing some overhead welding at Marinette Marine, an activity he only occasionally performed, Mr. Brandon heard a pop and felt pressure in his back. Almost immediately he experienced low back pain. Mr. Vieth, his working partner, confirmed that when Mr. Brandon came down from the ladder, he stated his back was hurting again, then hunched over and held his back. Mr. Vieth also reported that while Mr. Brandon finished the shift, he reported the new back pain to his supervisor. On February 14, 2000, Mr. Brandon also called Dr. Van Sadlers to report that he was experiencing back pain again and couldn't bend over. Then, on February 18, 2000, during an examination, Mr. Brandon informed Dr. Van Sadlers that he was experiencing shooting pain from his back down his buttocks to his legs.¹⁶ Since then, Mr. Brandon has continued to struggle with this persistent leg pain.

Marinette Marine's insurer at the time of the February 14, 2000 incident, CIGNA, questions whether any accident occurred and also asserts that Mr. Brandon's back pain was a natural consequence of his first work-related back injury on February 12, 1999. Marinette Marine's insurer at the time of the initial injury on February 12, 1999, RSKCO, maintains the February 14, 2000 back incident is either an aggravation of Mr. Brandon's pre-existing back problem or a new injury.

As a preliminary matter, I find that Mr. Brandon is able to invoke the presumption under Section 20 (a) concerning the February 14, 2000 incident. As reported by Mr. Brandon, and verified by Mr. Vieth, Mr. Brandon engaged in the activity of overhead welding at Marinette Marine on February 14, 2000 which caused something to go wrong with his back. Mr. Brandon's credible complaints¹⁷ established an

¹⁶Neither Dr. Baek nor Dr. Van Sadlers found any definitive objective medical evidence of Mr. Brandon's radiating leg pain. In fact, Dr. Baek noted the absence of such objective evidence and characterized his pain complaints as subjective. Yet, neither physician expressed any reservation about the legitimacy of Mr. Brandon's complaints. To the contrary, based on Mr. Brandon's pain complaints, Dr. Van Sadlers raised back surgery as a viable treatment option and eventually imposed more work restrictions. Accordingly, I find Mr. Brandon's unrefuted, subjective complaints establish the presence of radiating pain in his buttocks and thighs.

¹⁷I note that Mr. Brandon's veracity concerning the severity of his pain is further supported by his daily action of reporting to work as a ship fitter when his persistent back pain remained manageable. He only reported a

(continued...)

increase in back pain and the development of persistent radiating pain in his buttock and legs following the incident. Dr. Van Saders confirmed that the maneuver involved in overhead welding, which flexes the spine, could indeed cause Mr. Brandon some of the new pain he experienced. Thus, Mr. Brandon has established both the existence of an injury, in the form of back and chronic leg pain, and the occurrence of a work-related event¹⁸ that could have caused such an injury. Under the presumption of Section 20 (a), Mr. Brandon has established that his back and leg pain on, and after, February 14, 2000 was a work-related disability.

I also find insufficient evidence to rebut the Section 20 (a) presumption that a work-related connection existed between the February 14, 2000 work incident and Mr. Brandon's subsequent back and leg pain. Ordinarily, having failed to rebut the presumption, CIGNA, the insurer at the time of the February 14, 2000 incident, would be liable for any corresponding disability compensation and medical treatment. However, since Mr. Brandon had suffered a previous back injury at work, a potential exists for CIGNA to avoid liability.

In general terms, if an injured employee's condition and disability results from the natural progression of his earlier injury and would have occurred notwithstanding the presence of a second injury, liability for the disability must be assumed by the employer and corresponding insurer (in this situation, RSKCO) for whom the claimant was working when he was first injured. On the other hand, if the second injury aggravates a claimant's prior injury, thus further disabling the claimant, the second injury is the compensable injury and liability therefor must be assumed by the employer and its carrier (in this situation, CIGNA) for whom the claimant was working when "reinjured" *Strachen Shipping Co. v. Nash*, 782 F.2d 513 (5th Cir. 1986) (en banc) and *Abbott v. Dillingham Marine & Mfg Co.*, 14 BRBS 453 (1981) *aff'd mem sub nom Willamette Iron & Steel Co. v. OWCP*, 698 F.2d 1235 (9th cir. 1982).

Based on the *Strachen* case, the characterization of the February 14, 2000 event as either a natural progression or an aggravation of a prior injury will depend on medical opinion. Again, in Mr. Brandon's case both Dr. Baek and Dr. Van Saders were called upon for their expertise.

After reviewing Mr. Brandon's record and conducting an examination, Dr. Baek opined without explanation that Mr. Brandon's February 2000 back problem was a natural progression of his original back

¹⁷(...continued)

sharp change in such back pain following a specific event, such as getting out of a chair on December 12, 1999 and doing overhead welding on February 14, 2000.

¹⁸I found little foundation for CIGNA's position that no accident occurred. Although Mr. Vieth recalled that Mr. Brandon continually complained about pain at work, he also specifically remembered Mr. Brandon's back complaint on February 14, 2000 after performing an overhead weld. He also verified that Mr. Brandon reported the injury to his supervisor on that day. Additionally, Dr. Van Saders confirmed that Mr. Brandon called him on February 14th with a complaint of increased back pain. The preponderance of the evidence establishes that a work-related incident involving Mr. Brandon's back did occur on February 14, 2000.

injury.¹⁹ However, as demonstrated below, by the end of Dr. Baek's deposition, his original opinion about natural progression has little to no probative value.

When presented with an opportunity in a deposition to explain his opinion that Mr. Brandon's back pain on February 14, 2000 was just a natural consequence of the original February 12, 1999 back injury, Dr. Baek was subjected to rounds of questioning by three lawyers. His opinion did not endure. In particular, Dr. Baek became confused (due in part to the legal jargon, such as acceleration, aggravation, exacerbation, imbedded in the questions presented to him) as he attempted to explain how he reached his conclusion. As a result, during the questioning, he moved from his original conclusion of natural progression to an acknowledgment that the February 2000 back incident could have either aggravated or combined with the February 1999 back injury to create Mr. Brandon's present condition. Eventually, Dr. Baek surrendered by stating that while the February 14, 2000 incident may have aggravated the old injury, he really couldn't express an opinion. Additionally, Dr. Baek acknowledged his lack of in-depth knowledge of Mr. Brandon's case. He pointed out that due to Dr. Van Saders' on-going treatment of Mr. Brandon, Dr. Van Saders was more familiar with all three back incidents in this case and consequently in a better position to render an opinion on whether the February 14, 2000 back incident involved an aggravation of Mr. Brandon's pre-existing injury or was simply a natural progression of his back problems.

While I have found, as Dr. Baek suggested, that Dr. Van Saders had the better documented medical opinion in this case, even Mr. Brandon's treating physician exhibited some confusion as he developed his assessment of the February 14, 2000 incident. Initially, in his treatment notes, Dr. Van Saders termed the incident another flare-up. Then, when at the request of CIGNA (EX 3), Dr. Van Saders was presented with two carefully crafted, alternative written explanations for Mr. Brandon's condition, the physician checked the scenario that essentially said the same thing as Dr. Baek's initial opinion - the February 14, 2000 back problem was a natural progression of the initial work injury.

When Dr. Van Saders got his turn at the three lawyer deposition to explain his conclusion, he also displayed some confusion during the arduous questioning by the parties' various representatives. At the start, Dr. Van Saders stayed with his natural progression opinion by stating everything involving Mr. Brandon's back stems from the initial February 1999 accident which exacerbated his pre-existing spondylolisthesis. He again used the term "flare up" to describe the February 14, 2000 back incident. But then, Dr. Van Saders also agreed that overhead welding could cause hyper extension of Mr. Brandon's spine and aggravate his spondylolisthesis. He further stated that the February 14, 2000 overhead welding activity had accelerated Mr. Brandon's spondylolisthesis by causing leg pain. Eventually, recognizing the resulting confusion, Dr. Van Saders termed the causation issue about the February 14, 2000 injury a "gray area." Ultimately, he opined that the February 14, 2000 event clearly aggravated Mr. Brandon's never fully healed back that was initially injured on February 12, 1999. Thus, according to Dr. Van Saders, Mr.

¹⁹I simply observe with interest that Dr. Baek believed Mr. Brandon's movement in getting out of a chair in December 1999, which flexed his spine, amounted to an aggravation. Yet, Mr. Brandon's back pain following his overhead welding in February 2000, which hyper extended the spine, was a natural progression.

Brandon's present condition was a combination of both the February 12, 1999 injury and the February 14, 2000 injury. He believed both events were contributing factors.

Despite the confusing path Dr. Van Saders took in reaching his final answer, he clarified rather than surrendered like Dr. Baek. His ultimate opinion, indicating both work-related back incidents have combined to produce Mr. Brandon's back and leg pain, indicates that the radiating pain in his legs would not have just occurred in the absence of the aggravating event that occurred on February 14, 2000.²⁰ Therefore, in light of his extensive documentation, and the apparent collapse of Dr. Baek's opinion, I give Dr. Van Saders' ultimate opinion more probative weight.

Consistent with Dr. Van Saders' opinion, I find that the February 14, 2000 work-related back incident combined with the original back injury of February 12, 1999 and thus contributed to Mr. Brandon's present back and leg condition. The preponderance of the evidence does not show the incident on February 14, 2000 and the resulting leg pain was a natural progression. Rather, the greater weight of the more probative medical evidence shows Mr. Brandon's overhead welding at Marinette Marine on February 14, 2000 aggravated his never fully healed back injury and pre-existing spondylolisthesis to the extent that he suffered the additional disability associated with his leg pain. Consequently, CIGNA as the Employer's insurer at the time of the February 14, 2000 aggravating back incident, bears the entire liability, both in terms of disability compensation and medical treatment, for Mr. Brandon's entire back condition following the overhead welding incident of February 14, 2000.

Issue No. 3 - Medical Treatment and Disability Compensation

After the determining of the first two issues, the resolution of the third issue falls into place.

The medical evidence fails to establish that the disabling back pain of December 12, 1999 was not connected to Mr. Brandon's initial back injury on February 12, 1999. In addition, Mr. Brandon's activity on December 12, 1999 did not rise to the level of an intervening cause sufficient to sever the Section 20 (a) presumptive connection between the original back injury and the December 12, 1999 back pain in the same location. Consequently, RSKCO, the insurer at the time of the original injury on February 12, 1999, is responsible for the disability compensation associated Mr. Brandon's inability to work from December 13, 1999 through December 21, 1999 due to renewed back pain. As the parties have stipulated, the average weekly wage at the time of the original injury, which will determine the amount of disability compensation for Mr. Brandon's inability to work in December 1999, was \$368.75.

²⁰At one point in his deposition, Dr. Van Saders agreed in general terms that just by the process of aging spondylolisthesis can deteriorate to the extent that leg pain develops. That generalized statement hardly rebuts the Section 20 (a) presumption that Mr. Brandon's leg pain on February 18, 2000 is related to the overhead welding incident. Not only did Dr. Van Saders clearly link the leg pain to the February 14, 2000 work incident, there is a dearth of evidence to establish that by February 18, 2000, Mr. Brandon would have developed shooting pain in his buttocks and legs to the extent that back surgery became an appropriate treatment, absent his overhead welding activity at Marinette Marine on February 14, 2000.

Because the February 14, 2000 back incident from the overhead welding aggravated in part, and combined with, Mr. Brandon's pre-existing back injury, CIGNA, the insurer at the time of the February 14, 2000 work-related injury, bears responsibility for any disability compensation and medical treatment associated with Mr. Brandon's current back and leg condition. Both Dr. Baek and Dr. Van Saders, who evaluated Mr. Brandon's present condition, agree that back surgery is a viable treatment in this case.²¹ CIGNA pays for that surgery.

ATTORNEY FEES

Section 28 of the Act, 33 U.S.C. § 928, permits the recoupment of a claimant's attorney's fees and costs in the event of a "successful prosecution." Since I have determined an issue in favor of Mr. Brandon, his counsel, Mr. Lenz, is entitled to submit a petition to recoup fees and costs associated with his professional work before the Office of Administrative Law Judges. Mr. Lenz has thirty days from receipt of this decision and order to file an application for attorney fees and costs as specified in 20 C.F.R. § 702.132 (a). The insurers' attorneys, Mr. Powers and Mr. Sujack, have ten days from receipt of a fee application to file an objection to the request and address the appropriate share between the insurers of such legal costs.

ORDER

Based on my findings of fact, conclusions of law, and the entire record, I issue the following order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

1. The Employer, MARINETTE MARINE, and its insurer, CNA/RSKCO, shall pay the Claimant, Mr. DAVID C. BRANDON, compensation for **TEMPORARY TOTAL DISABILITY**, due to an injury to his back on February 12, 1999, from December 13, 1999 through December 21, 1999, based on an average weekly wage of \$368.75, such compensation to be computed in accordance with Section 8 (b) of the Act, 33 U.S.C. § 908 (b).
2. The Employer, MARINETTE MARINE, and its insurer, CIGNA/FRANK GATES ACCLAIM, **SHALL FURNISH** the Claimant, MR. DAVID C. BRANDON, medical treatment, including back surgery, as required by the back injury of February 12, 1999, combined with the back injury of February 14 , 2000, in accordance with Section 7 (a) of the Act, 33 U.S.C. § 907 (a).

²¹ Although agreeing to the necessity of back surgery, Dr. Baek and Dr. Van Saders apparently disagree on the nature and extent of such surgery. Just in case an issue develops on this point, I find, based on Dr. Van Saders' expertise as an orthopaedic surgeon and his better documented experience with Mr. Brandon, that Dr. Van Saders' surgery recommendation defines the appropriate parameters for Mr. Brandon's back surgery.

3. The Employer, MARINETTE MARINE, and its insurers, CNA/RSKCO and CIGNA/FRANK GATES ACCLAIM, shall receive credit for all amounts of compensation previously paid to the Claimant, Mr. DAVID C. BRANDON, as a result of the back injuries on February 12, 1999 and February 14, 2000.

SO ORDERED:

A
RICHARD T. STANSELL-GAMM
Administrative Law Judge

Date Signed: January 25, 2002
Washington, D.C.

Attachment 1

American Board of Medical Specialties®®

Certifications

Theresa Ann Oswald, MD

De Pere, WI

Certified by: **The American Board of Physical Medicine & Rehabilitation**

General Certificates:

Subspecialty Certificates:

Physical Medicine & Rehabilitation

American Board of Medical Specialties

1007 Church Street, Suite 404 | Evanston, IL 60201-5913

Phone Verification (866) ASK-ABMS

Phone: (847) 491-9091 | Fax: (847) 328-3596

Copyright ©© 2000 American Board of Medical Specialties

[www.abms.org]